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In The

Supreme Court of the United States

October Term, 1994

DWIGHT J. LOVING, *Petitioner,*

V.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

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BRIEF OF UNITED STATES NAVY-MARINE CORPS APPELLATE DEFENSE DIVISION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

JOHN FRANCIS HAVRANEK
Captain, U.S. Marine Corps
Counsel of Record

WILLIAM M. SCHRIER
Lieutenant, Judge Advocate General's Corps
U.S. Naval Reserve

Navy-Marine Corps Appellate Defense Division
Washington Navy Yard, Building 111
Washington, D.C. 20374-1111
(202) 433-4161

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1800

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICUS CURIAE* 1

ARGUMENT 2

I. THE PRESIDENT'S PROMULGATION OF AGGRAVATING FACTORS WHICH BY THEIR OWN FORCE RENDER CERTAIN SERVICE MEMBERS DEATH-ELIGIBLE EXCEEDED HIS CONSTITUTIONAL AUTHORITY TO ENFORCE THE LAWS, VIOLATED THE DOCTRINE OF SEPARATION OF POWERS, AND DEPRIVED PETITIONER OF DUE PROCESS OF LAW 2

II. A SENTENCE TO DEATH BY A PANEL COMPOSED OF AS FEW AS FIVE MEMBERS, VIOLATES THE FIFTH AND EIGHTH AMENDMENTS TO THE CONSTITUTION BECAUSE THE RESULT IS AN ARBITRARY, UNRELIABLE, AND INCONSISTENT APPLICATION OF THE DEATH PENALTY 6

CONCLUSION 12

TABLE OF AUTHORITIES

Cases:

Ballew v. Georgia, 435 U.S. 223 (1978) 9, 10, 11
Barefoot v. Estelle, 463 U.S. 880 (1983) 9
Burch v. Louisiana, 441 U.S. 130 (1979) 8
Dodson v. Zelez, 917 F.2d 1250 (10th Cir. 1990) 5
Duncan v. Louisiana, 391 U.S. 145 (1968) . . . . . passim
Furman v. Georgia, 408 U.S. 238 (1972) 11
Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951) 12
Levy v. Reasor, 17 U.S.C.M.A. 135, 37 C.M.R. 399 (1967) 5
Lisenba v. California, 314 U.S. 826 (1941) 8
Medina v. California, 112 S. Ct. 2572 (1992) 8
O'Callahan v. Parker, 395 U.S. 258 (1969) 8
Patterson v. New York, 432 U.S. 197 (1977) 8
Paul v. United States, 371 U.S. 245 (1963) 3
Schall v. Martin, 467 U.S. 253 (1984) 4
Strickland v. Washington, 466 U.S. 688 (1984) 9
United States v. Fernandez, 24 M.J. 77 (C.M.A. 1987) . 6
United States v. Matthews, 16 M.J. 354 (C.M.A. 1983) 3, 11
Weiss v. United States, 114 S. Ct. 752 (1994) 12
Whalen v. United States, 445 U.S. 684 (1980) 4
Williams v. Florida, 399 U.S. 78 (1970) 9
Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) . . . . . passim

Constitutional Provisions:

U.S. Const. art. II, § 3 . . . . . 3, 6
U.S. Const. amend. V . . . . . passim
U.S. Const. amend. VIII . . . . . passim

Statutes and Rules:

Article 16, U.C.M.J., 10 U.S.C. § 816 7
Article 25, U.C.M.J., 10 U.S.C. § 825 7
Article 36, U.C.M.J., 10 U.S.C. § 836 . . . . . 4, 5
Article 55, U.C.M.J., 10 U.S.C. § 855 9
Article 85, U.C.M.J., 10 U.S.C. § 885 2
Article 106, U.C.M.J., 10 U.S.C. § 906 2
Article 106a, U.C.M.J., 10 U.S.C. § 906a 2
Article 118, U.C.M.J., 10 U.S.C. § 918 2
18 U.S.C. § 3592 5
Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 201 . . . . . 6, 7, 10
Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 304 7
Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 601 7
Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 604 7
Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 701 6
Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 703 7
Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 704 7
Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 705 7
Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 706 7
Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 707 6
Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 903 6
Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 910 10

Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 912 8
Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1004 . . . . . passim
Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1107 7
Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1108 7

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BRIEF OF UNITED STATES NAVY-MARINE CORPS APPELLATE DEFENSE DIVISION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The United States Navy-Marine Corps Appellate Defense Division (the Division) represents Navy and Marine Corps personnel on appellate review of court-martial convictions. The Division currently represents two capital appellants and expects to assume representation of two more death-sentenced service members before the end of the year. The issues presented in the *Loving* petition for certiorari are of particular interest to the Division because these issues will directly impact appellate review of the four death sentences currently adjudged in the Navy and Marine Corps.

Moreover, if recent history is any guide, the Navy and Marine Corps can expect at least one capital court-martial annually. Thus, the Court's resolution of these issues is of utmost importance to presently death-sentenced service members and future capital accused. As required by Rule 37, the Division has sought and obtained consent of both parties prior to filing this brief.

ARGUMENT

I. THE PRESIDENT'S PROMULGATION OF AGGRAVATING FACTORS WHICH BY THEIR OWN FORCE RENDER CERTAIN SERVICE MEMBERS DEATH-ELIGIBLE EXCEEDED HIS CONSTITUTIONAL AUTHORITY TO ENFORCE THE LAWS, VIOLATED THE DOCTRINE OF SEPARATION OF POWERS, AND DEPRIVED PETITIONER OF DUE PROCESS OF LAW.

In promulgating Rule for Court-Martial (R.C.M.) 1004, the President elevated certain offenses under the Uniform Code of Military Justice (U.C.M.J.) to capital status. Although several U.C.M.J. provisions authorize death as a possible punishment, *see, e.g.*, Art. 118, U.C.M.J., 10 U.S.C. § 918 (authorizing death for premeditated or felony murder), Art. 85, U.C.M.J., 10 U.S.C. § 885 (authorizing death for desertion in time of war), only two codal provisions, by their own force, empower a court-martial to adjudge death. Art. 106, U.C.M.J., 10 U.S.C. § 906 (mandating death for spying in time of war); Art. 106a, U.C.M.J., 10 U.S.C. § 906a (specifically listing aggravating factors for espionage offenses).

Thus, before any court-martial may adjudge death, it must apply the provisions of R.C.M. 1004 as prescribed by the President. By any measure, therefore, R.C.M. 1004 has

the force of law. *See United States v. Matthews*, 16 M.J. 354 (C.M.A. 1983) ("Because of their promulgation under authority delegated by Congress, many provisions of the Manual for Courts-Martial . . . have the force of law.") (citing *Paul v. United States*, 371 U.S. 245 (1963) (other citations omitted)). That fact, however, should give this Court pause--the President's power, as defined in Article II, § 3 of the Constitution, is to enforce the laws, not to legislate; that is a function exclusively reserved to Congress. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646 (1952) (The Steel Seizure Case).

In The Steel Seizure Case, this Court held that Article II did not empower the President to seize the nation's steel mills absent an indication that Congress had delegated that power to him. In his concurring opinion, Justice Jackson addressed the Government's argument that the President's seizure powers were inherent in his power to enforce the laws:

> The third clause in which the Solicitor General finds seizure powers is that "he shall take Care that the Laws be faithfully executed . . . ." That authority must be matched against the words of the Fifth Amendment that "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." One gives the governmental authority that reaches so far as there is law, the other gives a private right that authority shall go no further. These signify about all there is of the principle that ours is a government of laws, not of men, and that we submit ourselves to rulers only if under rules.

Id. (footnotes omitted; other omissions in original). In

Petitioner's case, as in The Steel Seizure Case, the President enforced the "law" which he alone enacted. In such cases, the system is less a system of laws than it is a system of men, and it is therefore unfaithful to the principle of separation of powers.

Additionally, the language of the Due Process Clause itself undermines any view that the President acted constitutionally in enacting R.C.M. 1004: the Constitution guarantees that no person shall be deprived of life, liberty, or property, without due process of law. As Justice Jackson recognized, law is a product of the legislative, not executive branch. It is a check on executive authority, not a creature of that authority. *Id.*

Amicus recognizes that in this case, unlike The Steel Seizure Case, Congress has delegated some power to the President. *See* Art. 36(a), U.C.M.J., 10 U.S.C. 836(a) (permitting the President to prescribe procedural rules as well as modes of proof). Congress, however, did not delegate the function at issue here, nor could it do so without violating the doctrine of separation of powers. *Cf.* The Steel Seizure Case. Even if Congress could delegate the power to prescribe aggravating factors, it did not do so under Article 36.

Article 36, U.C.M.J. authorizes the President to prescribe procedural rules and "modes of proof," not the aggravating factors which by their own force render certain military accused death-eligible. In other words, the aggravating factors delineated in R.C.M. 1004 are substantive rules because they alone determine which accused service members may be executed for their offenses. As such, they should have been the product of legislative rather than executive action. *See Whalen v. United States,* 445 U.S. 684, 689 (1980) ("the legislative power, including the power to . . . prescribe punishments to be imposed . . . resides wholly in Congress."); *cf. Schall v. Martin*, 467 U.S. 253, 268 n.18 (1984) ("[T]he discretion to delimit the

categories of crimes justifying detention, like the discretion to define criminal offenses and prescribe punishments, resides wholly with the state legislatures."). Accordingly, by promulgating substantive rules which define certain offenses as capital, the President has exceeded the scope of power delegated to him by Congress and has thereby violated the doctrine of separation of powers.

Notably, Article 36 directs the President to prescribe procedural rules in a manner consistent with "the principles of law and rules of evidence generally recognized in the trial of criminal cases in United States District Court." Art. 36(a), 10 U.S.C. § 836(a). R.C.M. 1004, however, is directly contrary to current practice in U.S. District Court where Congress alone prescribes the aggravating factors for capital offenses. *See* 18 U.S.C. § 3592 (prescribing aggravating factors applicable in federal civilian capital proceedings). Thus, Article 36 did not authorize the specific rules at issue here because they do not conform to current practice in federal district court. *See generally Dodson v. Zelez*, 917 F.2d 1250 (10th Cir. 1990) (discussing the scope of the President's procedural rule-making power under Article 36, U.C.M.J.).

In *Dodson*, the Tenth Circuit Court of Appeals recognized that the President's rule-making authority within the military justice system parallels this Court's power to prescribe rules of practice and procedure in the federal civilian jurisdiction. *See id.* at 1257 (citing *Levy v. Reasor*, 17 U.S.C.M.A. 135, 37 C.M.R. 399, 403 (1967)). *Amicus* agrees with this view and notes that this Court's rule-making authority has never been extended to substantive matters of the kind presented here. In fact, Congress' promulgation of aggravating factors applicable in federal civilian cases indicates the limit of this Court's rule-making authority. The President's authority is similarly limited.

In sum, this Court should grant certiorari in Petitioner's

case to address whether the President's promulgation of aggravating factors in R.C.M. 1004 comported with Article II of the Constitution, the doctrine of separation of powers, and the Fifth Amendment's Due Process guarantee.

II. A SENTENCE TO DEATH BY A PANEL COMPOSED OF AS FEW AS FIVE MEMBERS, VIOLATES THE FIFTH AND EIGHTH AMENDMENTS TO THE CONSTITUTION BECAUSE THE RESULT IS AN ARBITRARY, UNRELIABLE, AND INCONSISTENT APPLICATION OF THE DEATH PENALTY.

A military jury, referred to as a panel of "members," is composed of officers,[1] who are generally detailed to serve on a court-martial by the commanding officer of the accused, otherwise known as the "convening authority." The convening authority is the individual, who in his sole discretion, determines whether an accused will go to a court-martial. The convening authority's role in the military is similar to that of a district attorney or U.S. Attorney. *See United States v. Fernandez*, 24 M.J. 77, 78 (C.M.A. 1987) ("In referring a case to trial, a convening authority is functioning in a prosecutorial role.") While the role of the convening authority is similar to a U.S Attorney, a convening authority possesses even greater discretion, responsibility, and control over a case. As such, the convening authority has the discretion to grant or deny continuance requests (R.C.M. 707); the authority to order depositions (R.C.M. 701); the authority to approve or deny

[1] An enlisted accused may request to be tried by a court-martial including enlisted members. R.C.M. 903. Except in cases where the death penalty can be adjudged, an accused can request to be tried by military judge alone, but in all capital cases the accused loses this choice and must be tried by members. R.C.M. 201 (f)(1)(C).

witness requests (R.C.M. 703); the authority to approve requests for expert assistance and expert witnesses (R.C.M. 703); the authority to grant immunity (R.C.M. 704); the authority to approve a pretrial agreement limiting the punishment an accused can receive at a court-martial (R.C.M. 705); the authority to order an inquiry into the mental responsibility of an accused by competent medical authorities (R.C.M. 706); the authority to cause charges to be withdrawn from consideration by a court-martial (R.C.M. 604); the authority to place an accused in pretrial confinement (R.C.M. 304); and, post-trial, the convening authority can suspend, disapprove, or execute a sentence awarded at a court-martial, approve or disapprove the findings of a court-martial, and order a rehearing (R.C.M. 1107, 1108).

Particularly relevant to the military accused is the fact that the convening authority has the sole discretion and authority to decide whether an accused's court-martial can sentence him to death. R.C.M. 201. This process is known as "referral" and consists of an order, by the convening authority, that charges against an accused will be tried by a specified court-martial. R.C.M. 601. When the convening authority authorizes the death penalty as a possible sentence the case has been "referred capital". R.C.M. 201.

The convening authority personally details members who, in the convening authority's opinion, are best qualified by age, education, training, experience, length of service, and judicial temperament. Article 25, U.S.C. § 825. Additionally, the convening authority determines the number of members that will serve on a court-martial, with the only requirement being that a general court-martial consist of not less than five members. Article 16, 10 U.S.C. § 816. The fact that the convening authority can influence the number of members that will hear a case becomes very significant because a military accused is

limited to only one peremptory challenge regardless of the number of members detailed to a case and regardless of capital referral. R.C.M. 912 (g)(1).

Concerning the potential a convening authority has to influence members, this Court has stated, "the suggestion of the possibility of influence on the actions of the court-martial by the officer who convenes it, selects its members and the counsel on both sides, and who usually has direct command authority over its members is a pervasive one in military law . . . ." *O'Callahan v. Parker*, 395 U.S. 258, 264 (1969).

For an accused to be eligible to receive the death penalty, the military requires that the members find, beyond a reasonable doubt and by a unanimous vote, that the accused is guilty.[2] R.C.M. 1004. In awarding a sentence of death, the members vote on the sentence must also be unanimous. R.C.M. 1004.

Fifth Amendment procedural due process examines the criminal process by determining whether it "offends some principle of justice so rooted in traditions and conscience of our people as to be ranked as fundamental." *Medina v. California*, 112 S. Ct. 2572, 2577 (1992) (quoting *Patterson v. New York*, 432 U.S. 197, 201-02 (1977)). It is well established that "[a]s applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice." *Lisenba v. California*, 314 U.S. 826, 836 (1941). Trial by a jury in serious criminal cases is fundamental to the American scheme of justice and essential to due process of law. *Burch v. Louisiana*, 441 U.S. 130, 133 (1979) (citing *Duncan v. Louisiana*, 391 U.S. 145 (1968)).

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[2] A unanimous vote as to a capital offense is only required for the accused to be eligible to receive the death penalty. An accused can be found guilty of the offense charged if two-thirds of the members vote for a finding of guilty, however, he would not be death eligible as to that offense.

As juries become smaller and smaller they begin to lack reliability and consistency. *Ballew v. Georgia*, 435 U.S. 223, 242 (1978). "In capital cases, for example, it appears that no State provides for less than 12 jurors--a fact that suggests implicit recognition of the value of the larger body as a means of legitimating society's decision to impose the death penalty." *Williams v. Florida*, 399 U.S. 78, 103 (1970). This Court has "consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding." *Strickland v. Washington*, 466 U.S. 688, 704 (1984) (Brennan, J., concurring in part/dissenting in part). Additionally, "[t]ime and again the Court has condemned procedures in capital cases that might be completely acceptable in ordinary cases." *Barefoot v. Estelle*, 463 U.S. 880, 913 (1983) (Marshall, J., dissenting).

Being convicted and sentenced to die by a panel of less than twelve members, lacks fundamental fairness, and utilizes a process of imposing death that is arbitrary, capricious, unreliable, and inconsistent.

The convening authority possesses, under the military death penalty scheme, the ability to influence the outcome in any capital case. Once a convening authority has referred a case as capital, the accused is precluded from pleading guilty, (R.C.M. 910), and loses the option of proceeding to trial by military judge alone. R.C.M. 201. Thereby, a members court-martial is the only means by which a military accused can be tried capital. As this Court stated in *Duncan v. Louisiana*, 391 U.S. 145 (1968), "Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Id.* at 156. Unfortunately, this safeguard is absent in the military where the convening authority, also the chief prosecutor,

hand picks the members[3] of an accused's court-martial, and determines how many will be detailed to the court.

In *Ballew*, Justice Blackmun, relying upon empirical data, came to five conclusions concerning the decrease in the size of juries:

First, the decline of jury size reduces effectiveness of group deliberation, leads to inaccurate fact finding and incorrect application of common sense to the facts, reduces the quality of group performance and productivity, and the ability of the group to overcome member biases and obtain an accurate result is hindered. *Id.* at 232-34.

Second, the risk of convicting an innocent person increases as the jury size declines, and inconsistency increases as well. *Id.* at 234-35.

Third, the verdicts of jury deliberation in criminal cases will vary as juries become smaller, and the variance amounts to an imbalance to the detriment of one side, the defense. *Id.* at 236.

Fourth, minority viewpoints and representation on juries will decrease. *Id.* at 236-37.

Fifth, in close cases the jury has its greatest value. Where the guilt or innocence of an accused is not readily apparent, a properly functioning jury system will tend to insure accurate fact finding. *Id.* at 237-39.

Where death is the potential outcome for an accused at a court-martial, reliability should be paramount to ensure that the sentence was not arbitrarily awarded. To ensure this reliability, a factfinding system should enhance group deliberation, accurate fact finding, quality group performance and productivity, consistency, and representation of minority interests.

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[3] These members are selected from the command structure of which the convening authority is in charge. A command structure which by its very nature requires the members to follow and obey the orders and directions of the convening authority.

Presently, a convening authority can arbitrarily choose the number of members that will serve on a court-martial, with the only requirement being that he detail at least five members. As the system currently operates, there is no consistency in the size of panels. An accused could be tried by a panel consisting of five, eight, or fifteen members, based upon the number of members detailed by the convening authority and the number of challenges for cause granted by a military judge. This variance in the size of panels creates an inconsistent and arbitrary application of the death penalty in violation of the Eighth Amendment. *See Furman v. Georgia,* 408 U.S. 238, (1972) (Stewart, J., concurring) (recognizing that the Eighth Amendment precludes the arbitrary and capricious imposition of the death penalty as would lead to freakish results).[4]

For example, two similarly-situated capital accused may be tried by widely disparate numbers of members based solely on the whim of the convening authority. One could be tried by a panel of five members while the other could be tried by a panel of twelve. Because there is a unanimity requirement for death, one accused may have a better chance of not receiving the death penalty solely by virtue of the discrepancy in panel size. This situation violates the due process guarantees of the Fifth Amendment and the reliability requirements of the Eighth Amendment.

As this Court noted in *Duncan v. Louisiana,* a jury trial safeguards against the corrupt or over zealous prosecutor. *Id.* at 156. In the military the convening authority--the functional equivalent of the chief prosecutor--can subjectively affect a court-martial by who and how many

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[4] Article 55 of the U.C.M.J., which prohibits "cruel **or** unusual punishment," provides additional protection to service members. 10 U.S.C. § 855; *see United States v. Matthews,* 16 M.J. 354, 368-69 (C.M.A. 1983).

of his subordinates he decides to detail to the court. This subjectivity undermines the fundamental fairness of being tried by a jury, can unlawfully influence the finding of a court, and creates an inherently unreliable system by which the military sentences people to death. Mandating twelve members would create consistency and enhance reliability.

CONCLUSION

The President's promulgation of aggravating factors in R.C.M. 1004 failed to comport with Article II of the Constitution, the doctrine of separation of powers, and the Fifth Amendment's Due Process guarantee.

As Justice Frankfurter observed, "'Due Process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place, and circumstances. . . . Due process is not a mechanical instrument. It is not a yardstick. It is a process." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 162-163 (1951). A process which requires a minimum of twelve members in capital cases will enhance the deliberative process, heighten the reliability of courts-martial, and create a process that is consistently applied for each accused facing the death penalty.

As Justice Ginsburg has stated, "men and women in the Armed Forces do not leave constitutional safeguards and judicial protection behind when they enter military service." *Weiss v. United States*, 114 S. Ct. 752, 769 (1994) (Ginsburg, J., concurring). This Court should address whether the President's promulgation of aggravating factors violates separation of powers, and whether a sentence to death by a panel composed of less than twelve members violates the Fifth and Eighth Amendments to the Constitution.

Respectfully Submitted,

JOHN FRANCIS HAVRANEK
Captain, U.S. Marine Corps
Counsel of Record

WILLIAM M. SCHRIER
Lieutenant, Judge Advocate
General's Corps
U.S. Naval Reserve

Navy-Marine Corps Appellate
Defense Division
Washington Navy Yard, Building 111
Washington, D.C. 20374-1111
(202) 433-4161

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